

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM PICKENS COUNTY  
General Sessions Court  
Edward W. Miller, Judge

**RECEIVED**  
FEB 05 2018  
SC Court of Appeals

Warrant Nos.: 2016A3920300063,  
2016A3920300064, 2017A3920300017, & 2017A3920300040

State of South Carolina.....Respondent,

vs.

Orin Jerrell Kemp.....Appellant.

RULE 203(d)(1)(B)(iv) SUBMISSION

Pursuant to Rule 203(d)(1)(B)(iv), SCACR, the following explanation establishes that there is a legal and factual basis for the appellate review of Appellant Orin Jerrell Kemp’s (“Appellant”) guilty plea that was entered on January 24, 2018 in front of the Honorable Edward W. Miller in the Pickens County Court of General Sessions. Section 24-13-40 of the South Carolina Code (2007) mandates prisoners receive credit for the time they served prior to trial unless one of two exceptions exist, either: (1) the prisoner was an escapee or (2) the prisoner was already serving a sentence on a different offense. “Because the language of section 24-13-40 is mandatory, a judge cannot deny a defendant credit for time served prior to trial unless one of the two exceptions applies.” State v. Boggs, 388 S.C. 314, 696 S.E.2d 597, 598 (Ct. App., 2010).

The earliest charges to which Appellant plead were a result of events that transpired on July 30, 2015. Four (4) days later, on August 3, 2015, Appellant came into pretrial custody in Anderson County in connection with separate charges and remained in custody for the next Four Hundred Twenty-Five (425) days. Despite only pleading to the charges associated with Warrant Nos. 2016A3920300063 and 2016A3920300064 from the July 30, 2015 events, Appellant was originally charged with additional charges, including Warrant No. 2015A3920300074. Warrant No. 2015A3920300074, which was based on the same set of facts as Warrant Nos. 2016A3920300063 and 2016A3920300064, was sworn out on October 9, 2015. Despite having completed the investigation and sworn out Warrant No. 2015A3920300074 on October 9, 2015, in which the attesting officer swore that the Warrant "shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable," the Clemson Police Department failed to serve Warrant No. 2015A3920300074 until September 30, 2016, some Three Hundred Fifty-Eight (358) days later.

In addition to sitting on Warrant No. 2015A3920300074, the Clemson Police Department inexplicably, and without apparent legal or factual justification, waited to spring the additional Warrants in connection with the July 30, 2015 events on Appellant until October 5, 2016. Coincidentally, the Clemson Police Department, despite Appellant being in custody and his location therefore being readily available and verifiable, held all of the charges connected to the July 30, 2015 incidents right up until Appellant was released from custody, at which time the Clemson Police Department sprang Warrant Nos. 2015A3920300074, 2016A3920300063 and 2016A3920300064 on Appellant. From the sequence of events it appears that Clemson Police Department's actions with regard to the warrants from the July 30, 2015 events were calculated

to detrimentally and adversely impact Appellant, his ability to resolve all charges pending against him at the same time, and Appellant's ability to obtain credit for time served. The actions of the Clemson Police Department are in direct contravention of the behavior the South Carolina Supreme Court explicitly admonished and prohibited in its Orders in In re Suber, S.C. Sup. Ct. Order dated May 7, 2015, and Hall v. State, S.C. Sup. Ct. Order dated Jan. 28, 2015. Based on the apparent misfeasance and/or malfeasance by the Clemson Police Department the assistant solicitor and undersigned counsel had negotiated and agreed that an appropriate remedy to which both the State and Appellant were amenable was for Appellant to receive credit for time served from all time served by Appellant between August 3, 2015 and September 30, 2016, some Four Hundred Twenty-Five (425) days, as well as Two Hundred Eighty-One (281) days Appellant spent in pretrial detention in Pickens leading up to his January 24, 2018 plea.

Despite the agreement reached by the State and undersigned counsel with regard to the periods that would be included in the calculation of credit for time served, an exact number of days was not calculated prior to Appellant's guilty plea because, prior to the plea, the State and undersigned counsel agreed to modify the plea deal to avoid Appellant being transferred to South Carolina Department of Corrections custody only to be released within less than a month of his transfer. Accordingly, when the issue of credit for time served became relevant upon Judge Miller refusing to accept the plea deal negotiated by the State and undersigned counsel, an explanation of the agreed upon calculation and the reason for the agreement, including undersigned counsel's specific citation to the Supreme Court's Order in In re Suber, was orally provided to Judge Miller. However, despite agreement between the State and undersigned counsel as to the calculation of Appellant's credit for time served and undersigned counsel's

direction of Judge Miller to the Supreme Court's Order in In re Suber, Judge Miller, while acknowledging that Appellant was entitled to some credit for time served, expressly disregarded the Supreme Court's reasoning and admonitions concerning police abuse of unserved arrest warrants and wrongfully delegated his statutory responsibility to the Department of Corrections to determine and grant Appellant the credit to which Appellant was entitled for time served.

In Appellant's case, the calculation of time served was complicated beyond a simple ministerial calculation due to the actions of the Clemson Police Department, and accordingly, it was the duty of the plea judge to determine the proper amount of time served. As the Supreme Court recently stated in Tant v. S.C. Dep't. of Corr., 408 S.C. 334, 346, 759 S.E.2d 398, 404 (2014), the Department of Corrections is confined to an unambiguous sentencing sheet in determining an inmate's sentence. Unfortunately, in Appellant's case, the actions of the Clemson Police Department along with Judge Miller's failure to specifically determine and notate Appellant's credit for time served rendered Appellant's sentencing sheets and the calculation of Appellant's credit for time served anything but unambiguous. Faced with the ambiguity in this case and Appellant's fundamental liberty interest, it was the duty of the plea judge to determine the credit for time served and it was an error of law for the plea judge to abdicate that duty and delegate his judicial discretion to the Department of Corrections. Id. at 341, 759 S.E.2d at 401 ("There can be no doubt the length of an inmate's incarceration implicates a constitutional liberty interest.").

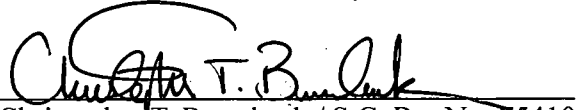
In addition to the issue concerning the determination of the credit for time served to which Appellant was entitled, there was further error by the plea court in failing to extend the opportunity to Appellant to stand down from his guilty plea when the Court went against the

extensively negotiated plea deal agreed to by the State and undersigned counsel. Appellant's case was extremely complex, encompassing multiple sets of charges that presented significant factual and evidentiary preservation issues. Based on extensive and hard fought negotiations by the State and undersigned counsel, the parties were finally able to agree to a plea deal that both sides believed was fair based on the legal and factual strengths and weaknesses of the cases. Based on the agreement of counsel that Appellant should receive credit for all time served by Appellant between August 3, 2015 and September 30, 2016, as well as the time Appellant spent in pretrial detention in Pickens leading up to his January 24, 2018 plea, a total of Seven Hundred Six (706) days, the parties agreed that as opposed to imposing a sentence of Four (4) years that would result in Appellant unnecessarily transferring to Department of Corrections custody only to be released in less than a month's time, Appellant would agree to an additional Ninety (90) days in the Stockade in Pickens County, a custodial work camp that provides services to Pickens County. Despite the plea offer agreed to between the State and Appellant, the Court refused to abide by the negotiated plea, disregarded the agreed upon determination of credit for time served to which Appellant was entitled, and instead sentenced Appellant to Ten (10) years suspended upon the service of Five (5) years. Failing to credit Appellant pursuant to the agreed upon calculation of credit for time served, which was at the core of Appellant's decision to plead guilty, resulting in Appellants guilty plea being based on a plea bargain that was ultimately unfulfilled. Clark v. State, 321 S.C. 377, 381 n.4, 468 S.E.2d 653, 656 n.4 (1996) (per curiam) ("A guilty plea which is based on a plea bargain which is not fulfilled or is unfulfillable cannot stand."). Accordingly, in the absence of properly granting Appellant credit for time served pursuant to the agreement of the State and undersigned counsel, the Court should not have

proceeded with the sentencing and instead have allowed Appellant to stand down from the plea. Proceeding forward with a guilty plea in contravention of the underlying agreement of the State and undersigned counsel as to the credit for time served constitutes an issue for the appellate review.

January 29, 2018

BRUMBACK & LANGLEY, LLC

A handwritten signature in black ink, appearing to read "Christopher T. Brumback", is written over a horizontal line.

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APPELLATE PRACTICE

CRIMINAL DEFENSE

PERSONAL INJURY

January 31, 2018

**VIA FIRST CLASS U.S. MAIL**

The Honorable Jenny Abbott Kitchings  
Clerk of Court for the Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211

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SC Court of Appeals

Re: *State of South Carolina vs. Orin Jerrell Kemp*  
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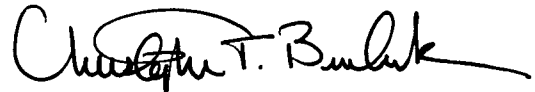
Dear Ms. Kitchings:

Enclosed herewith, please find one (1) original and (1) copy of the Notice of Appeal, the explanation required by Rule 203(d)(1)(B)(iv), SCACR, and the Proof of Service for the Notice of Appeal. Please stamp and return the copies to my office in the enclosed self-addressed, stamped envelope.

If you have any questions or should require anything further from my office, please do not hesitate to contact my office at (864) 414-9097.

With kindest regards, I am

Truly yours,



Christopher T. Brumback, Esq.  
Brumback & Langley, LLC

CTB/

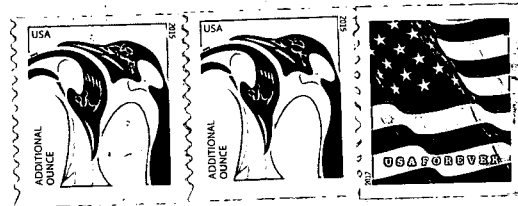
CC: Britni McCall, Esq.

Enclosures (3)



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The Honorable Jenny Abbott Kitchings  
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